

Chapter 9

Reforming the Law and Institutions of the WTO: the Dangers of Unexpected Consequences

Gregory Messenger*

Introduction

In the face of a global economic uncertainty the World Trade Organization (WTO) is presented with two interconnected and pressing needs. The first is to encourage further liberalization at the multilateral level and remediate the increasingly uneven and fragmented economic prospects offered by ever larger ‘super’ regional trade agreements such as the Transpacific Partnership or the Transatlantic Trade and Investment Partnership.¹ The proliferation of such agreements can cause not only trade diversion but also fragment the regulatory landscape for trade, further increasing legal uncertainty and adding costs for traders.²

*Lecturer in Law, University of Liverpool.

¹ The former includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam while the latter is between the EU and US.

² See generally, Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006).

The second challenge is to elaborate and clarifying the existing legal disciplines applicable to the Membership. A number of the agreements require further clarification, while others need amendment or alteration.³ Though this was an understandable position to have taken given the extraordinarily complicated negotiations during the Uruguay Round, what was not foreseen was the widespread deadlock in the negotiating branch of the WTO.⁴ Add to this the increasing size of the Membership (now close to universal), changing circumstances relating to technological and regulatory changes, and the need for legal reform becomes acute. While multilateral negotiations have made modest progress, there are still considerable challenges ahead.⁵

Though difficult, reform nonetheless presents opportunities for Members not only to improve WTO law but also to do so in a manner that serves their interests. Indeed, an institution such as the WTO, with its comparatively detailed set of disciplines and effective compliance mechanism, is especially attractive to Members for this purpose. This article seeks to identify the risks involved in expecting reform to produce results coincident with Members' interests or objectives, drawing attention to the dangers of unexpected consequences for Members who may find that their reforms do not lead to the results they

³ For example, art. X.1 General Agreement on Trade in Services, 15 April 1994, LT/UR/A-1B/S/1 <<http://docsonline.wto.org>>, 'There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.'

⁴ Richard Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 *American Journal of International Law* 247.

⁵ The Bali package representing the culmination of the Doha Round thus far.

originally intended. It further suggests that the relationship between expectations and outcomes can offer insights into the nature of WTO law more widely.

By way of demonstration, the paper identifies two interrelated areas of WTO law, one institutional and one substantive, where the expectations of the Members in question were not borne out. The first is in the creation of the new dispute settlement system at the WTO through the conclusion of the Dispute Settlement Understanding (DSU).⁶ In particular, the role that the Appellate Body has developed for itself. In spite of the expectations of the negotiating parties and the constitutional checks put in place, the Appellate Body has positioned itself at the heart of WTO law, drawing strong criticism for judicial activism and expansion of its remit.⁷ The second example, related though distinct, is the interpretation of article 17.6 Anti-Dumping Agreement (ADA) and its role in the ‘zeroing’ debate.⁸ This provision, which provides a different standard of review for panels in assessing the compliance of anti-dumping determinations than in other areas of WTO law, has been interpreted in a surprising way, contrary to the US administrative law principle upon which it was based (that of ‘*Chevron* deference’).

⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 <<http://docsonline.wto.org>>.

⁷ For example, John Greenwald, ‘WTO Dispute Settlement: An Exercise in Trade Legislation?’ (2003) *Journal of International Economic Law* 113; Claude E Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (American Enterprise Institute 2001); from a Resolution of the US House of Representatives, ‘the WTO dispute settlement process is not working and has been guided by politics rather than by legal principles’ (H.Res. 441, 17 November 2003) in response to the *US – Steel* dispute (DS252).

⁸ Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, LT/UR/A-1A/3 <<http://docsonline.wto.org>>.

The objective here is not to criticise the Appellate Body's institutional development or interpretative method, but rather to identify the disjoint between expectations and outcomes. These failures demonstrate the difficulty with designing an institution or rule-set to serve one's own interests. Nonetheless, we can draw lessons from these experiences, paying heed to the key role of institutional identities and interests in shaping how rules are subsequently applied, though with the caveat that identities are fluid, ever more so in an increasingly multi-polar global economy.

Institutional Reform: Expectations of a Dispute Settlement System

Dispute settlement at the WTO is often contrasted with its earlier incarnation during the GATT years (1947-1995).⁹ WTO dispute settlement, we say, is 'rule based' unlike the 'power based' system of the GATT years, now conducted by lawyers rather than diplomats.¹⁰ Clearly this is a caricature, the system developed over the 1947-1995 period, most notably after the introduction of the Tokyo Round Understanding in 1979 which marked a

⁹ On the influences at play in the reform of dispute settlement: Gregory Messenger, 'The Development of International Law and the Role of Causal Language' (2016) 2 *Oxford Journal of Legal Studies* (forthcoming).

¹⁰ John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed., MIT Press 1997) 109; Joseph HH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 206.

considerable shift.¹¹ Though progressive formalization of dispute settlement took a step forward in the Tokyo Round Understanding, it was still hampered by a number of institutional defects. Most notable of these was the practical inability of panel reports to be adopted, thus undermining their legal weight. Desiring a more formal and efficient system which would ensure that compliance with the new agreements concluded during the Uruguay Round could be ensured, negotiations over an effective dispute settlement system at the WTO began.

The negotiating history indicates that (especially during the first half of the round) the GATT Contracting Parties expected dispute settlement under the WTO to be an entirely different creature to that found in other areas of international law. Unlike disputes at the International Court of Justice or the European Court of Human rights, trade disputes were to be resolved in a *sui generis* manner. The EEC (as it was then) expressed the mood succinctly stating: ‘The GATT dispute settlement machinery is original and specific; there is *no equivalent* in other areas of international relations.’¹²

Not only was the nature of dispute settlement to be different, but also the process whereby decisions were reached. Note, rather than focussing on specific forms of legal reasoning which would be expected in other situations, here the EEC warned:

The [dispute settlement] machinery cannot and must not be used to create, through a process of *deductive interpretation*, new obligations for contracting

¹¹ Understanding on Notification, Consultation, Dispute Settlement and Surveillance, 28 November 1979, BISD 26S/210.

¹² Communication from the European Economic Community (EEC), 24 September 1987, GATT Doc. MTN.GNG/NG13/W/12, para. 1 (emphasis added).

parties, or to replace the negotiating process. One of the objectives of the Uruguay Round is to eliminate certain ambiguities and diverging interpretations of the General Agreement and Codes, and this will make a fundamental contribution to dispute settlement.¹³

Instead, the role of the dispute settlement system was to provide negotiated settlements, conciliation, and where the final resolution ‘should not be of a judicial nature.’¹⁴ The proposed introduction of appellate review was debated, not out of a concern over the creation of a new autonomous institution but rather that the speed and efficacy of the dispute settlement system would be affected were parties to automatically appeal in all disputes.¹⁵

During the Uruguay Round (at least until the final stages) it would seem that the negotiating parties were not expecting to create an institution which is now lauded for its formal and highly legalized nature.¹⁶ Given the complex and wide-ranging negotiations taking place with numerous groups, it may well be that the parties did not see the wider

¹³ Ibid. (emphasis added).

¹⁴ Communication from Brazil, 7 March 1988, GATT Doc. MTN.GNG/NG13/W/24.

¹⁵ See Note by the Secretariat, 13 November 1989, GATT Doc. MTN.GNG/NG13/16, para. 21; Note by the Secretariat, 15 December 1989, GATT Doc. MTN.GNG/NG13/17, para. 9; Note by the Secretariat, 28 May 1990, GATT Doc. MTN.GNG/NG13/19, para. 8.

¹⁶ James Crawford, ‘Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture’ (2014) 1 *Journal of International Dispute Settlement* 1, 4.

consequences of what was agreed in each specific area.¹⁷ In any case, the development of the Appellate Body's role since the creation of the WTO was not a certainty.¹⁸

Indeed, if we look to the text of article 17 DSU, which grants competences to the Appellate Body, is startlingly lacking in legal descriptors.¹⁹ Note article 17.1 DSU:

A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

There is no mention of a court, no tribunal, and no judges. The number of members is lower than judges at other international courts,²⁰ and they are part-time.²¹ Neither panels nor the Appellate Body issue judgments but rather reports, which must be adopted to have legal

¹⁷ I am grateful to Chris Parlin for raising this point.

¹⁸ Richard Steinberg (n 4) 250.

¹⁹ Though nonetheless using the term 'appellate' which does conjure legal images. I am grateful to David Zaring for raising this point.

²⁰ Peter Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization', in Rufus Yerxa and Bruce Wilson, *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press 2005) 65-66 citing the numbers of other permanent judges on international tribunals: 15 on the International Court of Justice, 18 on the International Criminal Court and 21 on the International Tribunal for the Law of the Sea.

²¹ Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, 19 June 1995, WT/DSB/1, paras. 10-12.

effect.²² The Dispute Settlement Body, a political organ of all Members of the WTO, must adopt reports which though in practice a formality due to the negative consensus rule, nonetheless creates an open space wherein the Membership can voice concerns over the interpretation offered by the Appellate Body.²³ The furore arising from the acceptance of *amicus curiae* briefs by the Appellate Body is one such example, with the representative of Hong Kong, China going so far as to claim:

...the acceptance of *amicus curiae* briefs by the Appellate Body was not explicitly provided for in the DSU nor had it been envisaged during the negotiations of the DSU. The unilateral expansion by the Appellate Body of its legal authority, which went beyond the DSU, was not only an act of judicial activism but also a violation of the amendment provisions under article X:8 of the WTO Agreement.²⁴

Such a public forum for criticism can function as a strict control on the Appellate Body's autonomy. Note how the statement of Hong Kong, China focussed its criticism by reference to the DSU and the WTO Agreement.²⁵ This prioritisation of the text encourages both panels and the Appellate Body to establish and maintain their own legitimacy through terms set by

²² Article 16.4 DSU in the case of panel reports and article 17.14 DSU in the case of Appellate Body reports.

²³ Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005) 79; Petros Mavroidis, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing', *Jean Monnet Working Paper* 2/01, 8.

²⁴ Minutes of Meeting, Dispute Settlement Body, 7 July 2000, WT/DSB/M/83, para. 15.

²⁵ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, LT/UR/A/2 <<http://docsonline.wto.org>>.

the DSU. Thus the ‘textual’ fixation of the WTO dispute settlement institutions which has become a hallmark of legal reasoning in world trade.²⁶

The way in which panels and the Appellate Body have responded to the guidance laid out for them is an interesting one. Quite different from the expectations outlined so far, they have created different identities, though in each instance using the DSU as a lodestar. What is of particular interest is the way in which their interpretation of the DSU and other agreements has caused consternation amongst some Members who perceived that a more appropriate alternative was the obvious choice to hand. As we shall see below, it is not necessarily that the Appellate Body or panels have interpreted the DSU or ADA *incorrectly* but rather that the expectation of how they would interpret a text has not been borne out by practice.

Panels and the Appropriate Standard of Review

For panels, art. 11 DSU sets out their responsibilities as well as the appropriate standard to apply in cases of review. The Appellate Body has stressed what it considers the principal role of panels in this context, confirming in its now famous dictum in *EC – Hormones*:

The function of Panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a Panel should make an objective assessment of the matter before it, including an

²⁶ Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”’ (2002) 36 *Journal World Trade* 605, 616.

objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.²⁷

The appropriate standard of review for panels is thus neither a full revision of the decision before it (i.e. *de novo* review) nor total deference to the Members' administrative agency. Instead, the requirement is for an 'objective assessment' which involves considering evidence and making factual findings.²⁸ The exact content of the 'objective assessment' is unclear and there has been considerable debate over its limits.²⁹

The negotiating history of Art 11 DSU shows serious concerns of the US over the level of deference that panels were to give national agency determinations.³⁰ Increasingly

²⁷ Appellate Body Report *European Communities – Measures Concerning Meat and Meat Products*, 16 January 1998, WT/DS26/AB/R and WT/DS48/AB/R para. 116 (underlining in original).

²⁸ Ibid. para. 133.

²⁹ Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar 2012) 50-52.

³⁰ Indicated in interviews conducted by John H Jackson: Steven P Croley and John H Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *American Journal of International Law* 193, 194-195.

concerned over the potential of intrusive involvement in domestic determinations the US was keen to incorporate a form of ‘*Chevron* deference’ into the DSU.³¹

US administrative law is particularly sensitive to the relationship between separate branches of government and the appropriate scope of involvement of one in the affairs of the other. Under the *Chevron* doctrine, in instances of delegated executive authority, both agency and courts are to abide by Congress’ intent where it is clear.³² Where Congress’ intent under the delegating legislation is not clear the agency’s interpretation of the legislation (and thus its duties and how it carries them out) is to be deferred to so long as it is not unreasonable.³³ In practice this creates a hierarchy of authority: Congress’ wishes are to be given priority where clear; failing that, where its instructions are unclear (intentionally or inadvertently) the agency’s judgment is to be given priority.³⁴ Only where the agency acts unreasonably is the judiciary to review its acts. The reasons given for such deference are debated although four bases have been suggested:

The Court suggested that the judiciary should defer to agencies because (1) Congress intends the courts to do so, (2) agencies exercise delegated legislative power when they issue interpretations, (3) agencies are more politically

³¹ Ibid. 194-195.

³² *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984).

³³ Ibid. 842-44.

³⁴ Ibid. 865-66.

accountable than courts, and (4) agencies have the necessary technical expertise that courts often lack.³⁵

This approach is designed to ‘foster democratic values by ensuring that policy decisions are being made by politically responsible bodies.’³⁶ It is thus a form of ‘counter-*Marbury* for the administrative state’³⁷ concerned with protecting the decisions of agencies from intrusive judicial involvement. *Chevron* is one of the most cited cases in US law, more than three foundational US Supreme Court decisions combined:³⁸ *Marbury v Madison*, *Brown v Board of Education*, and *Roe v Wade*.³⁹ At its heart, *Chevron* deference aims to ensure the legitimacy of decision-making via horizontal balances (i.e. between the branches of government and the exercise of their powers through delegation). At the WTO it would ensure that national agency determinations (which are politically accountable, at least within some systems) could not be unduly intruded upon by a supranational body which does not have equivalent accountability structures in place.

³⁵ Editorial, ‘Justifying the Chevron Doctrine: Insights from the Rule of Lenity’ (2010) 123 *Harvard Law Review* 2043, 2043-2044.

³⁶ Ibid. 2063. This has been strengthened by the Supreme Court’s decision in *Coeur Alaska, Inc. v Southeast Alaska Conservation Council*, 557 US 1 (2009) in which the Court retreated from previous decisions that had served to undermine *Chevron* deference, notably *United States v Mead Corp*, 533 US 218 (2001).

³⁷ Stephen G Breyer and others, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (6th ed., Aspen 2006) 246.

³⁸ Ibid.

³⁹ 5 US 137 (1803), 347 US 483 (1954), and 410 US 113 (1973) respectively.

Understandably, the other participants in the Uruguay Round who did not share the same constitutional settlement and culture of the US were concerned that such an approach would limit the potential effect of panels, restricting their ability to examine national measures. The result was deadlock.⁴⁰ A resolution was found by accepting Art 11 DSU in its current form but incorporating a more restrictive standard of review under Art 17.6 ADA. The more restrictive standard under Art 17.6 ADA was then to be reappraised for potential wider application (this did not happen).⁴¹

Art 17.6 ADA sets out instruction for the standard of review for both facts and law. On the appropriate standard of review for facts it states:

in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the Panel might have reached a different conclusion, the evaluation shall not be overturned*;⁴²

On the standard of review of law, panels are directed that:

⁴⁰ On the negotiating history of art. 11 DSU, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford University Press 2003) 72-80.

⁴¹ Decision on Review of article 17.6 of the Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994, adopted by the Trade Negotiations Committee, 15 December 1993, (1994) 33 *ILM* 1140.

⁴² Emphasis added.

the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. *Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.*⁴³

The clear nature of the bargain struck, and the well-known nature of *Chevron* deference, created an expectation that article 17.6 ADA would produce results in accordance with (particularly the US') expectations. However, as will be seen below, the outcome has been quite distinct. Meanwhile, Art 11 DSU has been understood by panels as focusing on their fact-finding role in the dispute settlement system.⁴⁴

The Judicialization of the Appellate Body

Contrary to the expectations of negotiators identified earlier, the Appellate Body has taken on the mantle of an international judicial body, a 'World Trade Court'.⁴⁵ This

⁴³ Emphasis added.

⁴⁴ See generally, Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) chapter 5. This tension is heightened due to the Appellate Body's inability to complete incomplete factual records.

⁴⁵ Claus-Dieter Ehlermann (n 26).

development, by no means inevitable, has had a profound influence on the way that the Appellate Body examines cases before it.⁴⁶

The first seven members of the Appellate Body were instrumental in defining its role as it stands today. In the words of one current Appellate Body member, they ‘shared a nearly missionary belief in the importance of the task entrusted to them.’⁴⁷ The Appellate Body has subsequently sought to maintain its legitimacy, acting as a ‘strategic quasi-judicial actor’⁴⁸ through decisions of particular ‘constitutional’ importance.⁴⁹ We might identify *US – Gasoline*⁵⁰ (confirming the position of the WTO within the wider firmament of international law) and *US – Shrimp Turtle*⁵¹ (setting out the scope of non-WTO obligations in the

⁴⁶ Peter Van Den Bossche (n 20) 63-64. Also, Peter Van Den Bossche, ‘From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System’, *Maastricht Faculty of Law Working Paper* 2005/1.

⁴⁷ Peter Van Den Bossche (n 20) 69, ‘most, if not all, members appointed in November 1995 shared a nearly missionary belief in the importance of the task entrusted to them.’

⁴⁸ James McCall Smith, ‘WTO Dispute Settlement: The Politics of Appellate Body Rulings’ (2003) 2 *World Trade Review* 65, 79. See also Ingo Venzke, *How Interpretation Makes International Law: on Semantic Change and Normative Twists* (Oxford University Press 2014) 188-195.

⁴⁹ Deborah Z Cass, ‘The “Constitutionalization” of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 *European Journal of International Law* 39.

⁵⁰ Appellate Body Report *United States – Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R, para. 17.

⁵¹ Appellate Body Report *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R.

interpretative process of the Appellate Body) amongst others of particular interest.⁵² Aside from these decisions, the Appellate Body has also developed its own Working Procedures to help clarify and develop the limited guidance left by the DSU.⁵³

Among the notable innovations, Van den Bossche has identified Rule 4 of the Working Procedures, which sets out a mechanism for the ‘exchange of views’ between all members before finalizing a report, as a key way to resolve the dangers of inconsistency and reduced authority that the three member divisions may otherwise have caused.⁵⁴ More generally the Working Procedures have served to ensure the judicial character of the procedures at the Appellate Body as opposed to the more informal pre-WTO dispute settlement practices.⁵⁵

Taking the embedded textual focus stemming from the DSU⁵⁶ and the Appellate Body’s desire to establish a mandate as a global trade court, the result is a balance between a textual focus in interpreting the covered agreements and, insofar as this textual approach

⁵² John H Jackson, ‘The Varied Policies of International Juridical Bodies – Reflections on Theory and Practice’ (2004) 25 *Michigan Journal of International Law* 869.

⁵³ Currently: *Working Procedures for Appellate Review*, 16 August 2010, WT/AB/WP/6.

⁵⁴ Peter Van Den Bossche (n 20), 69-71.

⁵⁵ Robert E Hudec, ‘The New Dispute Settlement System of the WTO: An Overview of the First Three Years’ (1999) 8 *Minnesota Journal of Global Trade* 1.

⁵⁶ Strengthened by the inclusion of the ‘cannot add to or diminish the rights and obligations...’ provision in the 29 November 1982 Ministerial Declaration, Geneva.

allows, deference to Members' own determinations.⁵⁷ The key point to note here is how the legal instruments constituting the Appellate Body as an institution influence its identity, though not necessarily as expected: the individual actions and priorities of the actors involved have played an important part in its development.

Reappraising Article 17.6 ADA: the Zeroing 'Saga'

The development of an independent judicial identity on the part of the Appellate Body has had a lasting impact on the way in which it interprets the covered agreements, as has the US' expectation of how it was to perform. For our purposes, the specific provision made for the standard of review in the area of anti-dumping investigations is of interest.

Anti-Dumping and the Practice of Zeroing

Anti-dumping duties are a form of contingent protection in that they allow Members to impose duties on goods sold at below normal value (dumped) which cause or threaten to cause injury to a domestic industry.⁵⁸ Dumping is not (in most cases) a governmental act,

⁵⁷ This is most notably the case in sanitary and phytosanitary investigations.

⁵⁸ For an economic analysis, see the relevant sections: Kyle W Bagwell and others, *Law and Economics of Contingent Protection in International Trade* (Cambridge University Press 2009).

rather it is private and thus not regulated directly by the WTO which concerns itself primarily with public (i.e. governmental) action (though article VI GATT does ‘condemn’ dumping where it causes injury). While dumping itself is not regulated, the response by Members to it (the introduction of anti-dumping duties) is. The introduction of anti-dumping duties requires an investigation into the circumstances and value of the goods in question. Dumping occurs where the normal value of the good is greater than its export price, with the difference constituting the margin of dumping. The margin of dumping determines the level of duties that may be introduced.⁵⁹

The calculation of anti-dumping duties is a technical exercise that raises a number of challenges for the investigating authority. How should normal value be calculated, for example? One might take average prices, or calculate costs including labour and raw materials. Under Art 2.1 ADA, normal value is the ‘comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country’.⁶⁰

Similar challenges arise in calculating the export price. It can be the transaction price (i.e. what is actually paid for the good) or alternatively can be constructed ‘on the basis of the price at which the imported products are first resold to an independent buyer, or if the

⁵⁹ Art. 9.3 ADA.

⁶⁰ Note that the use of ‘like products’ under the ADA is not the same as under art. I GATT or art. III GATT. Note under art. 2.6 ADA: ‘Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration’.

products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.’⁶¹

When calculating the margin of dumping (that is, the difference between the normal value and export price) the ADA gives some guidance: ‘margins of dumping... shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.’⁶² While the ADA gives guidance, one area on which it is silent is the practice of ‘zeroing’.

When calculating the margin of dumping we could take, broadly speaking, one of two approaches. Where the export value is higher than the normal value, we can identify the difference and attribute it a negative value. Alternatively we can attribute it a zero (hence the term). By calculating the margin in this way, the value of the anti-dumping duties is higher than it would be otherwise. In essence, zeroing disregards negative contributions to the calculation of the dumping margin and instead only takes into account the positive values.

There are different forms of zeroing. The two most common are ‘model zeroing’ and ‘simple zeroing’. In the case of model zeroing, the practice involves separating products into different types or categories (models) and then calculating dumping margins by comparing the weighted average normal value and the weighted average export price for each model. Where the margin is negative for that model (i.e. export price is higher than normal value) the number is set to zero. Where positive, it is added to the general calculation. In the case of simple zeroing, the comparison is between the prices of individual export transactions against

⁶¹ Art. 2.3 ADA.

⁶² Art. 2.4.2 ADA.

monthly weighted average normal values. Where the export price is higher than the weighted average normal value, the negative figure is set to zero. Thus in both cases, the dumping margin is greater than it would be if the ‘zeroed’ values were calculated without having been set to zero.⁶³

This has been the most contentious area in anti-dumping case law: numerous disputes, conflicts between panels and the Appellate Body, heated criticisms in the Dispute Settlement Body, and political ramifications in national arenas.⁶⁴ The question of whether zeroing itself is compliant with WTO law is not of itself a particularly problematic one: it is the relationship between the practice as reviewed by panels and the Appellate Body and the expectations of the Membership (and in particular the US) that has made it a flashpoint.

Litigious Ping-Pong: the Treatment of Zeroing at the WTO

⁶³ For a more detailed account of the different forms of zeroing: Tania Voon, ‘The End of Zeroing? Reflections Following the WTO Appellate Body’s Latest Missive’ (2007) 34 *Legal Issues of Economic Integration* 211; Bernard Hoekman and Jasper Wauters, ‘US Compliance with WTO Rulings on Zeroing in Anti-Dumping’ (2011) 10 *World Trade Review* 5.

⁶⁴ For a table of zeroing disputes: Dukguen Ahn and Patrick A Messerlin, ‘United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China: never ending zeroing in the WTO?’ (2014) 13 *World Trade Review* 267, 274.

The ADA is superficially silent on zeroing: it neither prohibits nor permits the practice. *EC – Bed Linen* was the first WTO case to examine this issue at the WTO. The panel found against the EC on its use of zeroing, a finding upheld by the Appellate Body.⁶⁵

In the wake of this decision, the EU came into compliance with commendable alacrity. Though Art 21.5 DSU proceedings continued, they were largely supportive of the EC's legal reform in the wake of the Appellate Body report.⁶⁶ In hindsight it is not particularly surprising: while zeroing was arguably within the legitimate scope of interpretations of calculation methods permitted by the ADA, a specific finding against it left little room for discussion.

Though *EC – Bed Linen* ruled out the use of zeroing, technically this was only with regard to 'model zeroing'. Over the following years the US found a number of its anti-dumping investigations or anti-dumping legislations challenged at the WTO.⁶⁷ In each instance, zeroing was prohibited, narrowing the scope of the possible use of the methodology until at last there was no scope for zeroing in any instance. With the exception of a 'rogue'

⁶⁵ Panel Report *EC – Anti-dumping Duties on Imports of Cotton Type Bed Linen from India*, 30 October 2000, WT/DS141/R, para. 6.119; Appellate Body Report *EC – Anti-dumping Duties on Imports of Cotton Type Bed Linen from India*, 1 March 2001, WT/DS141/AB/R, para. 66.

⁶⁶ The art. 21.5 panel found in favour of the EC, while the Appellate Body reversed only one finding: Appellate Body Report *EC – Anti-dumping Duties on Imports of Cotton Type Bed Linen from India (art. 21.5)*, 8 April 2003, WT/DS141/AB/RW, para. 146.

⁶⁷ For instance: *US – Final Dumping Determination on Softwood Lumber from Canada* (DS261); *US – Laws, Regulations and Methodology for Calculating Dumping Margins* (DS 294); *US – Final Dumping Determination on Softwood Lumber from Canada (art. 21.5)* (DS 264/RW); *US – Measures Relating to Zeroing and Sunset Reviews* (DS 322).

panel rejecting the reasoning of prior Appellate Body reasoning in *US – Final Anti-dumping Measures on Stainless Steel from Mexico*, the WTO view (and that of the Membership) was that the US was intransigent in its instance on using zeroing in anti-dumping investigations.⁶⁸ The US' continued use of zeroing was a non-compliance event, roundly criticised by the Membership. It is worth noting here the nature of DSB meetings and their process: in essence, Members take turns in identifying and questioning continued non-compliance by other Members. In the face of such criticism, the US' position on zeroing seemed wilful.

The *US – Continued Existence and Application of Zeroing Methodology* dispute formalized these concerns, challenging the US' position and gaining a definitive statement on the illegality of zeroing as a method for calculating anti-dumping duties. In the Appellate Body report, a concurring opinion directly clarified the situation. Acknowledging that the dispute over zeroing had been reasonable given the ambiguity of the text, and the underlying rationale of the measures, nonetheless the final statement was clear:

There are arguments of substance made on both sides; but one issue is unavoidable. In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of article 17(6)(ii). The range of meanings that may

⁶⁸ 'Systemic non-compliance': Dukguen Ahn and Patrick A Messerlin (n 64) 275.

constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.⁶⁹

Indeed, it affirmed its authority over the WTO through a number of interpretative moves.⁷⁰ It stated that Appellate Body reports are binding under the DSU, a largely uncontested claim.⁷¹ It continued that the precedential value of reports aids in the fulfilment of the aims of the DSU (specifically finding expression in Art 3.2 DSU), and that the continuity of reports, forming the WTO *acquis*, is thus essential in creating legitimate expectations and ensuring security and predictability to the WTO system.⁷² While the basis for such claims may be contentious, the WTO has largely followed this approach, hence the surprise when the panel in *US – Stainless Steel (Mexico)* refused to follow prior Appellate Body reasoning. Most

⁶⁹ Appellate Body Report *US – Continued Existence and Application of Zeroing Methodology*, 4 February 2009, WT/DS350/AB/R, para. 312.

⁷⁰ *Ibid.* para. 362.

⁷¹ Though, Judith H Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90 *American Journal of International Law* 416; Judith H Bello, 'Review: *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* by John H. Jackson' (2001) 95 *American Journal of International Law* 984.

⁷² Thus constituting 'established practice' of the institution: article 2(1)(j) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, UN Doc.A/CONF.129/15.

importantly and most strongly, it repeated its statement from *US – Stainless Steel (Mexico)* that:

...[the] creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements.⁷³

Whatever the role of the Appellate Body may play in its current form, it is questionable that this was the original intention of the Membership, especially in light of the evidence above. Zeroing was neither prohibited nor permitted, thus, from a *Chevron* inspired perspective, one would expect a respectful distancing on the part of the WTO dispute settlement institutions. These institutions, however, have their own priorities, quite distinct from those the US would expect them to have. It is a complex picture, with reasonable positions on both sides.

Irrespective, the narrative relating to zeroing was framed in terms of compliance and systemic integrity of the WTO legal system. The behavior of the US, however, was not based on bull-headedness but rather a specific expression of frustration with the inability to reconcile expectations with outcomes.

Interpreting the US Response to the Zeroing Cases

⁷³ Appellate Body Report *US – Final Anti-Dumping Measures on Stainless Steel from Mexico*, 30 April 2008, WT/DS344/AB/R, para. 161.

The reticence of the US to comply with its obligations under the Anti-Dumping Agreement has stimulated questions over the specific problems relating to anti-dumping law and its questionable underlying economic coherence.⁷⁴ It has also raised concerns over compliance procedures and effectivity of the WTO dispute settlement system, one that has thus far been viewed positively. The refusal of the Panel in *US – Stainless Steel (Mexico)* to follow the Appellate Body's previous findings likewise raised eyebrows.⁷⁵ Underlying all of these debates is a common presumption: notably, that the US (for better or worse) has lost the argument on zeroing and as the lone recalcitrant Member, insisted on its own approach to anti-dumping calculations and ignoring the practice and pleas of the Membership.⁷⁶

Instead of engaging with the question of whether the Appellate Body was correct in this decisions, or whether the US is regressing to a 'GATT-era' approach to compliance, here the focus is somewhat different. Why is it that the US insisted on pursuing zeroing as a legitimate form of calculation for anti-dumping margins for so long? Note, for example, the desire to reform the rules on anti-dumping following the Doha Declaration,⁷⁷ where amongst the contentious issues has been the question of zeroing. Positions on this topic ranged from a

⁷⁴ This has been a long-standing concern: Joseph Stiglitz, 'Dumping on Free Trade: The US Import Trade Laws' (1997) 64 *Southern Economic Journal* 402.

⁷⁵ Sungjoon Cho, 'A WTO Panel Openly Rejects the Appellate Body's "Zeroing" Case Law', 12 *ASIL Insight* 3 (11 March 2008); Petros Mavroidis, *Trade in Goods* (2nd ed., Oxford University Press 2012) 439.

⁷⁶ Bernard Hoekman and Jasper Wauters (n 63)63 38ff.

⁷⁷ Doha Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1, para. 28.

‘total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts.’⁷⁸

It cannot simply be that the US prefers to introduce greater anti-dumping duties than it otherwise would be able to: the same is true of the EU which nonetheless came into compliance following the *EC – Bed Linen* dispute.⁷⁹ Nor is it the case with other Members who not only do not use the zeroing methodology but have explicitly prohibited it under more recently concluded free trade agreements.⁸⁰ There is, of course, considerable political pressure within the US, especially within Congress. However, rather than viewing such hostility through a lens of self-interest, here it is suggested that such a response is symptomatic of a deeper conflict.

The argument here is that the US’ recalcitrance is directly related to its frustrated expectations. The specific wording of Art 17.6 ADA, already a compromise from a US perspective, was at least to ensure that a deferential standard of review be applied, at the least in anti-dumping disputes. The aim of Art 17.6 was clear, and the context from which it came, the US’ own *Chevron* doctrine, well known. Instead, the Appellate Body repeatedly rejected the use of zeroing, in a wide range of different situations from original investigations to reviews.

⁷⁸ Negotiating Group on Rules, ‘New Draft Consolidated Chair Texts of the AD and SCM Agreements’, 19 December 2008, TN/RL/W/236, 6.

⁷⁹ The EU was, with the US, the principal user of anti-dumping duties during the GATT years, hence their unity in negotiations on the ADA, Petros Mavroidis (n 75) 424.

⁸⁰ For example, art. 2.8(1)(h) Singapore-Jordan Free Trade Agreement, 29 April 2004, <http://www.fta.gov.sg/fta_sjfta.asp?hl=5>.

It is the nature of WTO law to encroach upon any number of highly contentious areas: the protection of human health, biodiversity, moral standards, national security, and environmental protection. The subject matter of the zeroing disputes does not display the same level of emotive resonance, and yet, the response to these cases has been impassioned. Though the content of the dispute may be technical, the way in which it is examined is not: it is a direct incursion into the highly developed constitutional tradition of the US. The peculiarity here is that the Appellate Body's interpretative approach is largely aimed toward ensuring its legitimacy and protecting from exactly this sort of criticism. Hence, the difference to NAFTA panels where the directions given are considerably more detailed.⁸¹

Note, the US response to the Appellate Body report in *United States – Anti-dumping measures on certain hot-rolled steel products from Japan*:⁸²

The specific and unique provisions in article 17.6 had been deliberately included to provide a special standard of review in anti-dumping investigations, intended to prevent panels from second-guessing the factual and legal determinations made by national authorities, and were an important part of the balance of rights and obligations assumed by the Members in agreeing to the Anti-Dumping Agreement. They could not be minimized or eliminated by dispute settlement reports. In this connection, the Appellate Body had aptly observed in its report in the case on "Hormones" that to adopt a standard of review that was not clearly

⁸¹ The contrast is especially notable in the softwood lumber dispute: Chios Carmody, 'Softwood Lumber Dispute (2001-2006)' (2006) 100 *American Journal of International Law* 664, 673.

⁸² Appellate Body Report *United States – Anti-dumping measures on certain hot-rolled steel products from Japan*, 24 July 2001, WT/DS184/AB/R.

rooted in the text of a specific Agreement may well amount to changing the finely drawn balance in the competencies conceded by Members and those jurisdictional competencies retained by Members for themselves. As stated by the Appellate Body, neither a panel or the Appellate Body was authorized to do that.⁸³

The US statement is both a call to the past deal on Art 11 DSU and the compromise relating to Art 17.6 ADA, and a plea to return to the proper reading of the text of the DSU as the US understands it.

What is of particular interest is that the Appellate Body has pursued the line on zeroing in a less deferential mode exactly because that is how it understands its direction from the DSU and its place in the WTO. Note, for example, how Art 3.2 DSU is both the motivation for criticism of the Appellate Body's position in failing to appreciate the role of Art 17.6 ADA and thus 'add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements', and at the same time is the basis for the Appellate Body's own position in 'providing security and predictability to the multilateral trading system'.⁸⁴

Concluding Remarks: Insights from Expectations

⁸³ Minutes of Meeting, Dispute Settlement Body, 2 October 2001, WT/DSB/M/108, para. 70 (footnote omitted).

⁸⁴ Art. 3.2 DSU. See (n 69) ff. and corresponding text.

The purpose of this article has not been to draw a negative image of the potential of reform for international economic law at either a substantive or institutional level (if indeed we can truly draw such a distinction). Rather, the aim has been, first, to identify the limitations of legal reform as the cure for systemic problems and second, to draw attention to the relationship between the frustrated expectations of legal reform and the conception of how law functions from the point of view of the reformer.

By creating a more effective mechanism for the settlement of disputes, and a more developed set of rules for the conduct of anti-dumping investigations, Members might have expected greater clarity and certainty rather than less. In the context of such widespread legal reform and institution building, a few gaps in the text might have seemed entirely reasonable. Yet it is these gaps that have become the battleground for disputes, disputes that are necessarily resolved by the dispute settlement (i.e. quasi-judicial) branch of the WTO in the face of the paralyzed rule-making (i.e. quasi-legislative) branch. We have seen how the identity of the Appellate Body has made this process both easier (in its willingness to engage in rule-elaboration) but also harder, in that it challenges the fundamental national assumptions of some of the Membership (here notably the US).

Thus instances of reform or legal change that do not produce expected outcomes can help us to find explanations for how the legal framework at the WTO has developed in the way that it has. The clearest of these has been that expecting successful outcomes in one's own interests based on using domestic models of law, or holding assumptions of how institutions will behave as law-appliers, belies the deeply complicated and complex nature of law generally, and legal institutions specifically. In particular it indicates a restricted view of how law focuses in different ways, not only through processes of interpretation and application but also through actors, including newly created institutions. For reform to

produce desired outcomes, a greater appreciation of the complexities and multi-faceted nature of law is required. We cannot expect institutions to behave as instructed at a fixed point in time, nor the law to be applied in the way in which it has been in other legal systems. Instead, reform must be tempered by sensitivity to law's multi-faceted nature, working not only in mechanistic terms but also as a powerful constraint, an empowerer and constitutor of identities both internationally and domestically.⁸⁵

⁸⁵ See further Gregory Messenger, *The Development of WTO Law: Examining Change in International Law* (Oxford University Press, 2016).